

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Petition for Rulemaking and Declaratory)	
Ruling of Craig Moskowitz and Craig)	
Cunningham)	

**COMMENTS OF ALPHA MEDIA, LLC, EMMIS COMMUNICATIONS
CORPORATION, ENTERCOM COMMUNICATIONS CORP., IHEARTMEDIA, INC.,
MINNESOTA PUBLIC RADIO, AND RADIO ONE, INC.
("JOINT BROADCAST COMMENTERS")**

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I. INTRODUCTION AND SUMMARY

Since 1992, the Federal Communications Commission (“FCC” or “Commission”) has recognized that a person’s provision of his or her phone number, without limiting instructions, constitutes his or her prior express consent to be called under the Telephone Consumer Protection Act of 1991 (“TCPA”).¹ Petitioners Craig Moskowitz and Craig Cunningham, (collectively, “Petitioners”), have asked the Commission to issue a declaratory ruling and initiate a rulemaking that would overturn this 25-year-old interpretation in a manner that would dramatically increase the burdens associated with sending people messages that they want to receive.² Specifically, current law permits companies to place autodialed or prerecorded calls or texts to wireless numbers after they have received prior express consent; it requires prior express *written* consent only if a call or text contains advertising or telemarketing. The Petition for Rulemaking and Declaratory Ruling (“Petition”), however, asks the Commission to expand the prior express *written* consent requirement to reach virtually all calls, a result that would upend legitimate business practices and conflict with consumer expectations.

The Commission should reject the Petitioners’ request. ***First***, the request is based on a mistaken understanding of what constitutes express consent and, therefore, has no legal merit.

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, ¶ 30 (Oct. 16, 1992) (“*1992 Report and Order*”) (“[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached.”).

² As an initial matter, to the extent that the Petition seeks a Rulemaking and Declaratory Ruling that would modify Commission orders from 1992, 2008, 2012, 2014, and 2015, it is at bottom nothing more than a woefully late petition for reconsideration. Petitioners offer nothing more than their own disagreement with the Commission’s prior rulings, nor do they provide any evidence of changed circumstances. Moreover, with specific respect to the Petition for Declaratory Ruling, there is quite simply, no genuine “controversy” to “terminat[e],” nor is there any “uncertainty” to “remov[e].” 47 C.F.R. § 1.2(a).

Second, grant of the request would have a devastating effect on legitimate business efforts to interact with and deliver information to consumers in the modern world. In rejecting this request, the Commission should take the opportunity to begin to make the TCPA work better for consumers and businesses, rather than for the plaintiffs' bar. Accordingly, Alpha Media, LLC, Emmis Communications Corporation, Entercom Communications Corp., iHeartMedia, Inc., Minnesota Public Radio, and Radio One, Inc. (collectively, "Joint Broadcast Commenters") urge the Commission to reject the Petitioners' request.

II. THE PETITIONERS' REQUEST IS BASED ON A MISUNDERSTANDING OF THE BASIC CONCEPT OF EXPRESS CONSENT AND THEREFORE LACKS LEGAL MERIT.

The Petitioners claim that the Commission's longstanding interpretation of the TCPA's "prior express consent" requirement is improper and should be overturned because it "includes implied consent resulting from a party's providing a telephone number to the caller."³ This claim has no legal merit, as it is premised upon a fundamental misunderstanding of the basic concepts of "express consent" and "implied consent." The Petitioners incorrectly assume that express consent cannot occur through affirmative actions.

To the contrary, it is well-settled that express consent may be manifested in writing, with words, *or through affirmative actions*. Consent is defined as "willingness in fact for conduct to occur"⁴ or "[a] voluntary yielding to what another proposes or desires."⁵ Consent may be express or implied: "Express consent may be given by words or affirmative conduct and implied consent may be manifested when a person takes no action, indicating an apparent willingness for

³ *Petition of Craig Moskowitz and Craig Cunningham for Rulemaking and Declaratory Ruling*, CG Docket Nos. 02-278, 05-338, at 2 (filed Jan. 22, 2017) ("*Petition*").

⁴ Restatement 2d of Torts §892(1).

⁵ Black's Law Dictionary (10th ed. 2014).

the conduct to occur.”⁶ The Restatement Second of Torts explains that “[n]ormally [consent] is manifested directly to the other by words *or acts* that are intended to indicate that [consent] exists,” and that consent may also be given “by silence or inaction.”⁷ Applying these concepts to the TCPA context, voluntarily providing a phone number during a broader transaction may constitute prior express consent through an affirmative act, as the Commission has properly recognized.⁸ Implied consent, on the other hand, would be given if a business cold-called a consumer and the consumer failed to object to the call.

With the correct understanding of consent, it is easy to dispose of Petitioners’ arguments that the Commission must require prior express *written* consent even for informational calls and texts. **First**, Congress has not directly spoken to the question at issue.⁹ Petitioners appear to argue that the question is whether the TCPA allows for implied consent to take the place of the express consent required by the statute. But, the real question is whether provision of a phone number, without limiting instructions, constitutes prior express consent. Petitioners are correct that the TCPA requires express consent as opposed to implied consent, but they are simply incorrect that an individual can manifest express consent only in writing. Indeed, Petitioners

⁶ *Barnes v. American Tobacco Co.*, 161 F.3d 127, 148 (3d Cir. 1998).

⁷ Restatement 2d of Torts § 892 cmt. b (emphasis added). Black’s Law dictionary defines “express consent” as “[c]onsent that is clearly and unmistakably stated.” *Black’s Law Dictionary* (10th ed. 2014). Providing a phone number is affirmative conduct that conveys a willingness to receive communications, and thus readily meets these standards.

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, ¶ 9 (Jan. 4, 2008) (“2008 Declaratory Ruling”) (“We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”); *1992 Report and Order* ¶ 30.

⁹ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). But see Petition at 17-22 (arguing that the Commission’s interpretation fails “step one of *Chevron*”).

themselves recognize that “the TCPA does not define the term ‘prior express consent,’”¹⁰ and nowhere in the text of the statute does it indicate that provision of a number cannot satisfy the requirement. As the FCC has correctly noted, “the TCPA is silent on the issue of what form of express consent—oral, written, *or some other kind*—is required for calls that use an automatic telephone dialing system or prerecorded voice”¹¹

Second, the Commission’s interpretation of the “prior express consent” requirement in light of Congress’s silence on the issue is a permissible construction of the TCPA.¹² Recognizing that provision of a phone number without limiting instructions manifests express consent is neither contrary to the statute, contrary to congressional intent, nor unreasonable.

Both the *1992 Report and Order* and the *2008 Declaratory Ruling* are firmly rooted in the statute and in line with legislative intent. As demonstrated above, the statutory language does not address what form of express consent is required to satisfy the TCPA. In light of this silence, the Commission has rightly turned to legislative history to ascertain congressional intent to inform its decisions. In 1992, the Commission relied on legislative history showing that Congress agreed that it would not be a violation of the TCPA to “call[] a number which was

¹⁰ *Petition* at 22; see 47 U.S.C. §227; see also *Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv-02902-CLS, 2012 WL 5511039, at *5 (N.D. Ala. Nov. 9, 2012).

¹¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, ¶ 21 (Feb. 15, 2012) (“*2012 Report and Order*”) (emphasis added); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; Declaratory Ruling and Order, 30 FCC Rcd 7961, ¶ 49 (July 10, 2015) (“*2015 Declaratory Ruling and Order*”) (“Although prior express consent is required for autodialed or prerecorded non-telemarketing voice calls and texts, neither the Commission’s rules nor its orders require any specific method by which a caller must obtain such prior express consent.”).

¹² *Chevron*, 467 U.S. at 843. But see *Petition* at 22-25 (arguing that the Commission’s interpretation fails “*Chevron* step two”).

provided as one at which the called party wishes to be reached.”¹³ Specifically, the House Report that the Commission looked to for support stated that when a person provides a contact number, “the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.”¹⁴ Again in 2008, the Commission looked to legislative history, quoting the same House Report as stating that “[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”¹⁵

Moreover, the Commission’s decisions on this issue have been well-reasoned. In 1992, the Commission looked to consumer expectations, along with the text of the statute and legislative history, to decide that provision of a phone number can constitute prior express consent. There, the Commission noted that “[m]any comments express the view that any telephone subscriber that provides his or her phone number to a business does so with the expectation that the party to whom the number was given will return the call.”¹⁶ In 2008, the Commission again came to a well-reasoned and well-supported interpretation of the TCPA’s “prior express consent” requirement. There, the Commission focused on the context surrounding the provision of the phone number, making clear that its interpretation only encompassed situations in which consumers actually and expressly consented to be called.¹⁷ The Commission drew a limiting principle regarding its prior express consent standard: the scope of the consent is

¹³ *1992 Report and Order* ¶ 31 & n.57.

¹⁴ *See* H.R. Rep. No. 102–317, at 13 (1991).

¹⁵ *2008 Declaratory Ruling* ¶ 9.

¹⁶ *1992 Report and Order* ¶ 30.

¹⁷ *2008 Declaratory Ruling* ¶ 10.

determined by the context of the transaction during which the number is provided.¹⁸ This well-reasoned limit on the prior express consent standard can be seen in other Commission TCPA proceedings, as well. For example, in the *2015 Declaratory Ruling and Order*, the Commission reiterated that “the scope of consent must be determined upon the facts of each situation.”¹⁹ Accordingly, the Petitioners’ argument that the Commission’s decisions are unreasonable fails.

Third, the Petitioners’ argument that the *1992 Report and Order* and the *2008 Declaratory Ruling* are inconsistent with other Commission decisions rests on their incorrect and unduly narrow understanding of the term “prior express consent.” For example, Petitioners claim²⁰ that the *2012 Report and Order*’s statement that “the TCPA is silent on the issue of what form of express consent—oral, written, or some other kind—is required for calls that use an automatic telephone dialing system or prerecorded voice” undermines the Commission’s determination that provision of a phone number can constitute prior express consent.²¹ Although it is true that allowing implied consent in one proceeding would be inconsistent with requiring express consent in another, nowhere has the Commission actually allowed implied consent to substitute for the “prior express consent” mandated by the TCPA. Indeed, the Commission has gone out of its way to do otherwise, holding, for example, that a telephone number’s mere

¹⁸ *Id.* (“We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.”).

¹⁹ *2015 Declaratory Ruling and Order* ¶ 49 (discussing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling, 29 FCC Rcd 3442 (Mar. 27, 2014) (“*GroupMe Declaratory Ruling*”)).

²⁰ *See Petition* at 28-29.

²¹ *2012 Report and Order* ¶ 21.

appearance on a contact list does not constitute prior express consent.²² Simply stated, affirmative conduct (*i.e.*, providing a phone number without limiting instructions) is a valid way to convey express consent. Rather than creating inconsistency, recognizing this fact harmonizes the Commission's statements across all of its proceedings.

In sum, Petitioners' claims about the Commission's interpretation of the "prior express consent" requirement lack merit. The statute does not speak directly to the issue of whether provision of a phone number constitutes express consent, and the reading of the term "prior express consent" to include provision of a phone number is "eminently reasonable."²³ Moreover, the Commission consistently has required express consent in its TCPA proceedings. The Petitioners miss the mark with their arguments because they improperly limit the term "prior express consent" to preclude consent that is expressly conveyed through affirmative action that is not oral or written. Congress did not limit the phrase in this way, and there is no imperative for the Commission to do so either. Moreover, the Petitioners cherry-pick district court cases in an attempt to demonstrate that courts disagree with the Commission regarding its "prior express consent" interpretation.²⁴ The opposite is true: "The authorities *are almost unanimous* that

²² 2015 Declaratory Ruling and Order ¶ 51. Petitioners claim that this conclusion conflicts with the view that an individual can give prior express consent by providing his or her phone number, *see Petition* at 29-30, but it is in fact consistent with that view. It was entirely logical for the Commission to conclude that the mere fact that an individual's phone number appears on *another person's* wireless phone contact list does not satisfy the prior express consent requirement, but that an individual's direct provision of his or her own phone number does.

²³ *See Pinkard v. Wal-Mart Stores, Inc.*, 2012 WL 5511039 at *5.

²⁴ *See, e.g., Petition* at 2 ("[N]umerous federal and state courts have harshly criticized the 1992 and 2008 Orders because implying consent to receive autodialed or prerecorded telephone calls from a person's providing a telephone number irreconcilably conflict's with Congress's explicit statutory mandate requiring 'prior express consent' . . . to receive such calls.").

voluntarily furnishing a cellphone number to a vendor or other contractual counterparty constitutes express consent.”²⁵

III. GRANT OF THE PETITIONERS’ REQUEST WOULD HAVE A DEVASTATING EFFECT ON LEGITIMATE BUSINESS EFFORTS TO INTERACT WITH AND DELIVER INFORMATION TO CONSUMERS IN THE MODERN WORLD.

A. Legitimate Business Interests Have Relied on the Prior Express Consent Standard, Which Properly Balances Consumer Privacy and Business Interests, for Non-Telemarketing Calls and Texts to Wireless Numbers for 25 Years.

With the TCPA’s passage in 1991, Congress aimed to prevent unwanted telemarketing calls, *not* informational calls that consumers request, expect, and like. As Chairman Pai has described, “Congress passed the [TCPA] to crack down on intrusive telemarketers and over-the-phone scam artists.”²⁶ Indeed, in the Preamble to the TCPA, Congress cited to the “proliferation of intrusive, nuisance calls to [consumers’] homes from telemarketers” as a reason for enacting the legislation.²⁷ Even the Supreme Court has recognized that the TCPA is targeted at nuisance calls and not all calls: “Congress determined that federal legislation was needed because *telemarketers*, by operating interstate, were escaping state-law prohibitions on *intrusive nuisance calls*.”²⁸

²⁵ *Saunders v. NCO Financial Systems, Inc.*, 910 F. Supp. 2d 464, 467 (E.D.N.Y. 2012) (emphasis added); *see also Emanuel v. Los Angeles Lakers, Inc.*, No. CV 12–9936–GW(SHx), 2013 WL 1719035, at *3 (C.D. Cal. Apr. 18, 2013) (“[M]any federal courts have concluded that when a customer provides a company his or her phone number in connection with a transaction, he or she consents to receiving calls about that transaction.”).

²⁶ *2015 Declaratory Ruling and Order* at 8072 (Dissenting Statement of then-Commissioner Ajit Pai).

²⁷ Telephone Consumer Protection Act of 1991, PL 102-243, 105 Stat. 2394, §2 (Dec. 20, 1991).

²⁸ *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 370 (2012) (also citing the Preamble of the TCPA) (emphasis added); *see also Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035, at *3 (“Courts “broadly recognize that not every text message or call constitutes an actionable offense; rather, the TCPA targets and seeks to prevent the proliferation of intrusive, nuisance calls.” (internal quotations omitted)).

Accordingly, the statute clearly distinguishes between telemarketing calls and non-telemarketing calls, a distinction that the Commission has faithfully maintained for 25 years. Specifically, the statute requires prior express consent for (1) autodialed or pre-recorded calls made to wireless numbers,²⁹ and (2) prerecorded calls made to residential lines.³⁰ Congress gave the Commission the authority to exempt residential calls that do not have a commercial purpose, or that do have a commercial purpose but would not adversely affect privacy rights and do not contain unsolicited advertisements.³¹ With these mandates, the Commission has developed a regulatory scheme that, in relevant part, requires (1) *prior express consent* for most autodialed and prerecorded *non-telemarketing calls* that are made to wireless numbers;³² (2) *prior express written consent* for most autodialed and prerecorded *telemarketing calls* that are made to wireless numbers;³³ and (3) *prior express written consent* for most prerecorded *telemarketing calls* that are made to residential landline numbers.³⁴

In 2012, the Commission recognized the distinction that Congress drew between telemarketing and non-telemarketing calls when the agency heightened the consent standard for telemarketing calls only. Specifically, the Commission held:

While a few commenters argue that we should require written consent for *all* autodialed or prerecorded calls (*i.e.*, not simply those delivering marketing messages), we conclude that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls. For instance, bank account balance, credit

²⁹ 47 U.S.C. § 227(b)(1)(A)(iii).

³⁰ *Id.* § 227(b)(1)(B). Both prohibitions in the statute are subject to certain exceptions. *See id.* § 227(b)(1)(A), (b)(1)(B).

³¹ *Id.* § 227(2)(B).

³² 47 C.F.R. § 64.1200(a)(1)(iii).

³³ *Id.* § 64.1200(a)(2).

³⁴ *Id.* § 64.1200(a)(3).

card fraud alert, package delivery, and school closing information are types of information calls that we do not want to unnecessarily impede. We take this action to maximize consistency with the [Federal Trade Commission]’s [Telemarketing Sales Rule], as contemplated in the [Do Not Call Improvement Act], and avoid unnecessarily impeding consumer access to desired information.³⁵

Moreover, Congress made clear in the TCPA that regulation must balance consumers’ rights to privacy with legitimate business interests: “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”³⁶ The Commission has acknowledged this mandate to balance individual privacy rights with legitimate business practices throughout its TCPA proceedings. For example, the Commission has stated that:

- “Our task in this proceeding is to implement the TCPA in a way that reasonably accommodates individuals’ rights to privacy as well as the legitimate business interests of telemarketers.”³⁷
- “[This Order] seeks to balance the concern that consumers’ privacy be protected with the imperative that telemarketing practices not be unreasonably hindered.”³⁸
- “We believe the rules the Commission adopts here strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers.”³⁹
- “[W]e affirm the vital consumer protections of the TCPA while at the same time encouraging pro-consumer uses of modern calling technology.”⁴⁰

Indeed, Commissioner O’Rielly rightly recognized the importance of balancing the interests at stake in a recent TCPA proceeding, noting that the Commission’s actions should “protect

³⁵ *2012 Report and Order* ¶ 21.

³⁶ *Id.* ¶ 24.

³⁷ *1992 Report and Order* ¶ 3.

³⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 10 FCC Rcd 12391, ¶ 4 (Aug. 7, 1995).

³⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, ¶ 1 (July 3, 2003).

⁴⁰ *2015 Declaratory Ruling and Order* ¶ 2.

consumers from unwanted communications while enabling legitimate businesses to reach individuals that wish to be contacted. That is the balance that Congress struck when it enacted the [TCPA] in 1991.”⁴¹

Taken together, the purpose and text of the TCPA, along with Congress’s mandate to balance the privacy rights of consumers with the legitimate interests of businesses, has created a regulatory environment where businesses should be able to reach out to consumers’ wireless numbers with non-telemarketing information so long as they obtain “some form of prior express consent” beforehand.⁴² Businesses have built compliance models around this scheme for the past 25 years. Changing its mind now would cause the Commission to add undue burden to legitimate business communications and would “unnecessarily impeded[e] consumer access to desired information,” something it has consistently, and rightly, refused to do in the past.⁴³

B. Requiring Written Consent for Non-Telemarketing Calls to Wireless Numbers Would Chill Important Communications from Broadcasters and Others.

Local broadcast stations play vital roles in their respective communities, keeping listeners and viewers informed and entertained, whether at home or on the go. The broadcast industry is constantly innovating to serve audiences. As such, broadcasters have come to rely on modern calling technology to efficiently deliver a wide variety of messages that are requested, expected, and appreciated by their audience members. For example, broadcasters utilize modern-day equipment to send breaking news and weather alerts to individuals who have signed up for such services. These alerts keep stations’ audience members informed of news that affects them and

⁴¹ *Id.* at 8084 (Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part).

⁴² *2012 Report and Order* ¶ 3.

⁴³ *Id.* ¶ 21.

their families and of severe weather in their area. In some cases, these messages can save lives, and offer redundancy in the event that broadcast operations may be interrupted. Even when messages do not rise to the level of emergency, such as alerts concerning traffic conditions and school closings, they are still critical to serving local communities' news and entertainment needs. Additionally, broadcasters utilize modern technology to allow listeners to participate in contests and respond to surveys about stations' programming. Such contests are a part of the quality, in-demand programming and content that listeners have come to expect from broadcasters, and text-based surveys allow broadcasters to improve their service to local communities. Both types of interactions also further the ability of stations to engage with their audiences.

In today's media environment, broadcast audiences expect and demand modern interactions with the stations that serve their communities, just as consumers as a whole expect and demand these kinds of interactions across industries. Requiring written consent for non-telemarketing communications would be wholly out of line with consumer expectations. Even under the FCC's current rules, the TCPA already imposes greater burdens on companies wishing to use modern technology to communicate via telephone with willing recipients of information than those that exist in other contexts. Adding a *written* consent mandate to virtually every such communication would be excessive and serve only to discourage legitimate communications that consumers wish to receive. Moreover, imposing a written requirement across the board, after years of accepting express consent that is not written, would leave consumers who have already expressed their consent to receive informational messages and who rely on such information suddenly in the dark.

Public broadcasters similarly utilize modern calling equipment to reach out to members. Public broadcasters also rely heavily on the financial support of their audiences to provide thoughtful and compelling news, music, and cultural programming, and these contributions help to create a more informed, educated, and inspired public. A large part of public broadcasters' audience support comes from current members who rely on phone contact from stations to remind them of the opportunity to repeat or increase their donations.⁴⁴ Limiting phone outreach by requiring written consent for public broadcasters to engage with audience members for non-telemarketing purposes would impose a sizable hit on public broadcast stations' outreach efforts. Not only would such a limitation fly in the face of members' preferences and expectations, but it would hinder stations from being able to effectively communicate with their members, and would strain public broadcasters' already limited resources. Accordingly, Petitioners' proposed rule revision as it relates to tax-exempt non-profit organizations (which would cover many public broadcasters, including Minnesota Public Radio) is particularly absurd.⁴⁵

⁴⁴ Indeed, members often thank the station for calling with such a reminder. Phone outreach also offers public broadcast stations a practical and efficient way to reach their audience members. When a listener or viewer signs up to be a member, that person provides a limited amount of contact information. In many cases, the only information provided is a phone number. This contact information is used by stations not only to request additional donations, but also to keep the member informed of his or her giving status, for example, by notifying the member that his or her credit card has expired. Again, members appreciate this notification, as their intent is to continue their donations.

⁴⁵ Although Petitioners purport to recognize the need to retain the current prior express consent standard for tax-exempt non-profit organizations (which covers many public broadcasters, including Minnesota Public Radio), *see Petition* at 39, their proposed rule does the opposite. Petitioners propose to add the word "written" to Section 64.1200(a)(1) of the Commission's rules, which currently requires only "prior express consent." *Id.* at 42 (§ 64.1200(a)(1)). This would appear to impose a written consent requirement on "any telephone call" that is made to a wireless number and is not made for emergency purposes. *Id.* (§ 64.1200(a)(1)(iii)). However, Petitioners would maintain the exception for tax-exempt non-profits in section 64.1200(a)(2), which applies to advertising and marketing messages. Accordingly, non-profits would need only prior express consent for calls or texts that "introduce[] an advertisement or constitute[] telemarketing," but would need *written* consent for all other calls.

Chairman Pai has warned that “the TCPA has strayed far from its original purpose,”⁴⁶ while Commissioner O’Rielly has urged the Commission to use the TCPA to actually “protect Americans from harassing robocalls and texts” and not to “penalize businesses and institutions acting in good faith to reach their customers using modern technologies.”⁴⁷ Granting the Petitioner’s requested relief would be inconsistent with both of these urgings. Simply put, impeding communications that consumers request, expect, and appreciate is not what the TCPA is meant to do.

IV. THE PROPOSED CHANGE WOULD FURTHER INVIGORATE THE ALREADY OVERLY AGGRESSIVE PLAINTIFFS’ BAR.

Finally, with TCPA litigation abuse continuing to run rampant, the Commission must consider the effect that the Petitioners’ proposed change would have in adding fuel to the TCPA fire that has been lit by the plaintiffs’ bar. Given that, as demonstrated above, Petitioners offer no valid legal basis for altering longstanding and well-reasoned Commission policy, it is apparent that their requests for rulemaking and declaratory ruling are nothing more than an opportunistic attempt to expand the prospects for litigation recoveries. TCPA lawsuits have exploded in recent years, and there is no end in sight. In 2007, there were 14 TCPA claims filed by unique consumer plaintiffs; in 2016, that number grew to 4860.⁴⁸ Last year’s number—4860—represents a 31.8% increase from the 3687 TCPA claims filed in 2015.⁴⁹ More TCPA

⁴⁶ *2015 Declaratory Ruling and Order* at 8073 (Dissenting Statement of then-Commissioner Ajit Pai).

⁴⁷ *Id.* at 8084 (Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part).

⁴⁸ *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, Webrecon (Jan. 24, 2017), <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/>.

⁴⁹ *Id.*

claims were filed in the single month of December 2016 than were filed in all of 2010: 362 suits in December 2016 versus 354 suits in 2010.⁵⁰

One reason for the explosion in TCPA litigation is that some see the statute as a money-making opportunity. The former Chief of Staff to Commissioner Clyburn has noted that plaintiffs' attorneys have found the TCPA to be particularly profitable: "the average recovery for a consumer in a TCPA class action settlement was \$4.12. Their lawyers, by contrast, received an average of \$2.4 million."⁵¹ Indeed, the Petitioners themselves are part of the problem. Mr. Cunningham is a well-known serial plaintiff. Press stories have indicated that he sees calls from debt collectors "as lucrative opportunities."⁵² Mr. Cunningham has even "author[ed] articles on how to sue debt collection companies for profit."⁵³ For his part, Mr. Moskowitz is no stranger to TCPA litigation.⁵⁴

TCPA lawsuit abuse will continue to increase if the Commission continues to "twist[] the law's words even further to target useful communications between legitimate businesses and

⁵⁰ *Id.*

⁵¹ Adonis Hoffman, *Does TCPA Stand For 'Total Cash for Plaintiffs' Attorneys'?*, The Hill (Feb. 17, 2016, 6:30 AM), <http://thehill.com/blogs/pundits-blog/technology/269656-does-tcpa-stand-for-total-cash-for-plaintiffs-attorneys>.

⁵² Kimberly Thorpe, *Better Off Deadbeat: Craig Cunningham Has a Simple Solution for Getting Bill Collectors Off His Back—He Sues Them*, Dallas Observer (Jan. 21 2010, 4:00 AM), <http://www.dallasobserver.com/news/better-off-deadbeat-craig-cunningham-has-a-simple-solution-for-getting-bill-collectors-off-his-back-he-sues-them-6419391>.

⁵³ *Cunningham v. Credit Management, L.P.*, 2010 WL 3791104, at *6 (N.D. Tex. Aug. 30, 2010); *see id.* (finding that Mr. Cunningham brought a lawsuit which included TCPA claims "in bad faith and for purposes of harassment").

⁵⁴ *See, e.g.*, Robert Storace, *Supermarket Sued for Spamming Shopper's Cellphone*, The Connecticut Law Tribune (Nov. 16, 2016), <http://www.ctlawtribune.com/id=1202772560264/Supermarket-Sued-for-Spamming-Shoppers-Cellphone?mcode=0&curindex=0>; Sally Nyemba, *Law Firm Sued for Spamming with Text Message Marketing*, National Trial Lawyers (Dec. 1, 2014), <http://www.thenationaltriallawyers.org/2014/12/text-marketing/>.

their customers.”⁵⁵ Expanding the requirement to obtain *written* consent for non-telemarketing messages would do just this—unnecessarily twist the words of the law to make it harder for companies to conduct legitimate business and easier for plaintiffs’ lawyers to obtain big settlements. Again, this is not how the FCC should be administering the TCPA. The TCPA should protect consumer privacy while enabling legitimate businesses to deliver to consumers the information consumers want when they want it; it should not be a tool used to continue to line the pockets of plaintiffs’ attorneys and serial litigants.

V. CONCLUSION

For the reasons set forth above, Joint Broadcast Commenters respectfully request that the Commission deny the Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham.

Respectfully submitted,

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⁵⁵ 2015 *Declaratory Ruling and Order* at 8073 (Dissenting Statement of then-Commissioner Ajit Pai).